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No. 712

In the Supreme Court of the United States

OCTOBER TERM, 1960

UTAH CITIZENS RATE ASSOCIATION, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

MOTION TO AFFIRM

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Pursuant to paragraph 1(c) of Rule 16 of the Revised Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the judgment of a three-judge district court which dismissed an action brought by a rate association of shippers and one of its members to set aside an order of the Interstate Commerce Commission. The complaint attacked the Commission's determination, made pursuant to Section 13(4) of the Interstate Commerce Act, as amended, 72 Stat. 570 (1958), 49 U.S.C. 13(4), that Utah intra-

state freight rates, apart from specified exceptions, caused undue discrimination against, and an undue burden on, interstate commerce to the extent that they did not include increases which the railroads maintained on like traffic between points in Utah and adjoining states, under authority granted by the Commission in three nationwide revenue proceedings. (*Ex parte No. 175,* 280 I.C.C. 179, 281 I.C.C. 557, 284 I.C.C. 589; *Ex parte No. 196,* 298 I.C.C. 279; *Ex parte No. 206,* 299 I.C.C. 429, 300 I.C.C. 633).

In *Public Service Commission* v. *United States,* 356 U.S. 421, this Court held invalid an earlier order of the Commission directing the railroads operating in Utah to raise their intrastate rates, with certain exceptions, by amounts comparable to the increases authorized in interstate rates in *Ex parte No. 175, supra.* The ground of decision was that the evidence was insufficient, under the standard of proof required in a Section 13(4) proceeding, to support two related findings of the Commission—"that existing intrastate rates were abnormally low and failed to contribute their fair share of revenue needs of the railroads" (356 U.S. at 424) and "that the conditions incident to intrastate transportation were not more favorable than those incident to interstate movements" (*id.* at 425). With respect to the first finding, this Court said that proof that intrastate rates were lower than corresponding interstate rates was not sufficient absent "positive evidence to indicate that the relative cost of intrastate traffic was as great as that of interstate shipments" (*id.* at 426). As for the second finding, this Court observed that

proof that interstate and intrastate traffic was intermingled and handled by the same crews failed to establish substantial similarity as to all "material factors bearing on the reasonableness of rates" (*id.* at 427–428). The Court also appears to have regarded the force of the supporting evidence as seriously weakened by evidence tending to show that as to the intrastate traffic the density was greater, the operating ratios lower and the returns higher than comparable systemwide figures on interstate traffic (*id.* at 428).

The Court also noted that, although the findings gave no indication that the Commission had "concerned itself with the revenues derived from, or the conditions incident to, intrastate passenger operations" (*ibid.*), the Court's opinion in *Chicago, M., St. P. & P. R.* v. *Illinois*, 355 U.S. 300, 308, required the Commission, in a revenue proceeding involving intrastate freight rates, to give consideration to revenue derived from other intrastate services (*id.* at 428–429).

On remand of the proceeding to the Commission, it was consolidated with applications requesting the Commission to determine the lawfulness of Utah intrastate freight rates in relation to the increased interstate rates authorized in *Ex parte No. 196* and *Ex parte No. 206, supra.*

The Commission found, on the evidence before it on further hearing, that the Utah interstate and system densities "exceed[ed] those for [Utah] intrastate operations by at least three times" (309 I.C.C. 149, 164), and that labor costs, constituting about 62% of total operating expenses, were greater for Utah intra-

state than for Utah interstate traffic (*ibid.*).[1] Moreover, the Commission, on a reappraisal of the density statistics referred to by this Court in its decision in the case, found that those statistics could be given little weight because the Utah figures comprised both interstate and intrastate operations, and therefore treated as Utah traffic, bridge or overhead traffic (constituting more than 50% of the total (*id.* at 155)), which neither originated nor terminated in Utah (*ibid.*).

Neither the State of Utah nor its Public Service Commission is a party to the present suit attacking the Commission's order, which was filed solely by appellant Utah Citizens Rate Association.[2] The district court unanimously dismissed the action (J. St. 37).[3]

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[1] The Commission's more detailed, underlying findings were that the Union Pacific's wage cost per 1000 car miles was $23.52 for through trains and $226.07 for local trains; that the Denver and Rio Grande's wage cost per 1000 car miles was $20.01 for through trains and $220.58 for local trains; and that, for both railroads, some 90% of the through train traffic was interstate, whereas less than half of their local train traffic was interstate (309 I.C.C. 156). As to the Western Pacific, over 99% of its through train traffic was interstate, whereas on its local trains only 38% of the traffic was interstate (*ibid.*).

The district court, on the day of the hearing before it, granted appellant Structural Steel & Forge Co., one of the Association's shipper members, leave to become a party plaintiff. On the question of legal standing to maintain the action, the court held that the Rate Association could not, but that the plaintiff shipper could, maintain the action (J. St. 25–28).

[3] The opinion was written by District Judge Christenson. He had dissented from the district court affirmance of the order found invalid in 356 U.S. 421, upon the ground that certain crucial Commission findings lacked adequate evidentiary support. *Public Service Commission* v. *United States*, 146 F. Supp. 803, 810–818 (D. Utah) (dissenting opinion).

It held that the Commission's findings had adequate evidentiary support, and said that it believed, after careful examination of the record, that "the prior deficiencies have been corrected within the law of the case" (J. St. 36). It also held that Section 13(4) of the Interstate Commerce Act, as amended in 1958, made it unnecessary for the Commission to concern itself with intrastate passenger revenues and conditions unless the parties supporting the existing intrastate freight rates made an affirmative showing that conditions in the intrastate passenger field were such as to militate against the conclusion that the intrastate freight rates, by reason of inadequate contribution to the railroads' revenue needs, unjustly discriminated against interstate commerce (see J. St. 29–35).

ARGUMENT

This appeal presents no substantial question for review by this Court.

1. Appellants contend that in certain respects the evidence with reference to costs and revenue is insufficient to support the finding that conditions incident to intrastate transportation were not more favorable than those incident to interstate transportation. The contentions, developed under the headings "Terminal Costs," "Density" and "Comparative Rates" (J. St. 14–19), however, are without substance, and must be evaluated in the light of appellants' failure to allege or claim a lack of evidence to support the many detailed findings by the Commission (309 I.C.C. at 155–158, 164) which underlie its ultimate finding.

Terminal Costs. Appellants complain that, with the exception of evidence rejected by the Commission as unreliable, there is no evidence to show terminal costs and that there is therefore no evidence respecting a material cost factor.[4] In *New Automobiles in Interstate Commerce*, 259 I.C.C. 475, 511, the full Commission declared that terminal costs "are relatively much more of a factor in the short-haul than in the long-haul costs," and that about 94% of the costs for distances over 75 miles is for the line haul. As for Utah, the Commission found in its original report in this proceeding that intrastate traffic moves on "relatively short hauls," whereas interstate traffic moves on "relatively long hauls." *Utah Intrastate Freight Rates and Charges*, 297 I.C.C. 87, 104. It follows therefore that, if it were possible to allocate terminal costs to intrastate and to interstate commerce accurately, the allocation would substantiate the other compelling evidence as to the higher cost of intrastate operations.

Density. Although appellants raise a question as to density, they do not contend that the Commission's finding that the density of Utah interstate traffic was at least three times as great as that of Utah intrastate traffic (309 I.C.C. at 164) lacks evidentiary support. Rather, appellants attack the premise behind the finding, relying on a statement in the dissenting opinion of Mr. Justice Frankfurter in *Public Service Com-*

[4] Appellants quote (J. St. 14) *Des Moines & Central Iowa R. v. Chicago, B. & Q. R. Co.*, 232 I.C.C. 489, 494, a ruling by a division of the Commission that "[p]ractical operating men have estimated that 40 percent of the transportation expense of the carriers is involved in their terminals."

mission, supra, 356 U.S. at 453, that a comparison between the density of interstate traffic within a state and the density of its intrastate traffic, although of some probative value, becomes entirely reliable only if the equivalence between "the density of interstate traffic within the state" and the "density of interstate traffic for the entire region for which the interstate rates have been set" be assumed. But in the passage cited by appellants Mr. Justice Frankfurter was only discussing the probative value of the "density figures" which the Court had considered in its opinion (see *id.* at 452), and the kind of density figures which would be of optimum probative value. The Justice did not imply that such optimum proof was a requisite in the present type of proceeding; indeed the burden of his dissent was that the Court had applied an unduly rigorous standard of proof.

Comparative Rates. Appellants also question whether there was sufficient valid evidence to sustain the Commission's finding that intrastate rates were below those of interstate rates for comparable distances. The government's brief in the prior appeal (No. 15, October Term, 1957, pp. 14–15), however, referred to the findings that, for many major commodities, interstate rates were materially higher than corresponding intrastate rates, and this Court (356 U.S. at 424) referred to the evidence of such rate disparity without questioning its sufficiency. Moreover, this rate disparity has necessarily been increased by the higher interstate rates authorized in *Ex parte No. 196* and *Ex parte No. 206, supra.* Finally, as this Court observed in *King* v. *United States,* 344 U.S.

254, 275: "Where the Commission seeks to deal generally with rates and revenues in a large area on evidence typical of the area as a whole, it may proceed by way of a general order supported by sufficient evidence applicable to the whole territory." The 1958 amendment to Section 13(4) went far to validate the test applied in *King* and in various prior decisions of this Court dealing with Section 13(4) orders. See Conference Committee Report on the 1958 Amendment, 104 Cong. Rec. 15527, quoted *infra*, pp. 9–10.

2. Appellants further contend that the Commission erroneously failed to inquire into the question of whether or not the railroads' intrastate passenger operations were more favorable, by resulting in relatively lower deficits, than their interstate passenger operations. But both the Commission and the district court correctly ruled that the 1958 amendment to Section 13(4) made such inquiry unnecessary (see *e.g.*, J. St. 29–35).

Prior to the amendment, Section 13(4) provided that, whenever the Commission, after a hearing, finds that any rate or fare imposed by authority of a state causes "any undue, unreasonable, or unjust discrimination against interstate or foreign commerce," it shall prescribe the rate or fare thereafter to be charged which will remove such discrimination. The 1958 amendment added the following clause after the words "interstate or foreign commerce":

> (which the Commission may find without a separation of interstate and intrastate property, revenues, and expenses, and without considering in totality the operations or results

> thereof of any carrier, or group or groups of carriers wholly within any State), * *

The Conference report on the bill made the meaning and effect of the above change in Section 13(4) unmistakable. The report pointed out that the amendment "deals with the nature of the evidence to support a finding of undue discrimination." 104 Cong. Rec. 15527. The report further stated (*ibid.*):

> Apparently the holdings in these cases [*Chicago, M., St. P. & P. R.* v. *Illinois,* 355 U.S. 300; *Public Service Commission* v. *United States,* 356 U.S. 421] mean that the required finding of undue discrimination against, or undue burden on interstate or foreign commerce can be made only in the light of the overall statewide totality of a carriers operating results arising from all the rates applicable within a State.
>
> This would preclude the ICC from making such a finding on a showing of only the effect of the particular intrastate rate or rates in question. The ICC could not under such a rule continue to function effectively in removing unjust discrimination against interstate commerce caused by intrastate rates. In addition, the burden on the carriers of presenting in evidence a separation of interstate and intrastate property, revenue, and expenses would impose an intolerable accounting problem and an almost impossible burden of proof.
>
> As stated in the dissenting opinion of four justices in the Utah case, a consequence of the decisions "would be a radical, and in all likelihood unworkable, change in the way the

Commission has administered the provisions of section 13(4) for over 35 years."

It is essential that the standard of proof acceptable for 35 years be maintained. That is the purpose of this amendment.

3. An additional ground for affirmance of the judgment below is that the only shipper plaintiff maintaining the present action to review the Commission's state-wide revenue order lacked standing.[3] The challenged order imposed no command upon the shipper, and the Commission specifically stated that its findings "relate to Utah intrastate rates generally, and are without prejudice to reexamination, upon complaint or otherwise, as to the lawfulness of any individual Utah intrastate rate on any particular commodity" (309 I.C.C. at 166–167). There is thus at least serious doubt as to whether the shipper, who was not a party to the administrative proceedings, may call into question the lawfulness of a state-wide revenue order, which imposes no command on him, and under which he is free to obtain a determination of the lawfulness of any individual rate or rates affecting him. See *Georgia Public Service Commission* v. *United States*, 283 U.S. 765, 772; *Alexander Sprunt & Son* v. *United States*, 281 U.S. 249, 255; *Wisconsin R.R. Commission* v. *Chicago, B. & Q. R.R.*, 257 U.S. 563, 591.

[3] Appellants have not challenged the holding below that appellant Rate Association lacks standing to maintain the action.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the district court should be affirmed.

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